No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ERIC HENRY WOODBERRY
and
BRADFORD MARSELAS JOHNSON
Petitioners,

v.
UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUZANNE LEE ELLIOTT
SUITE 339, 2400 N.W. 80TH STREET
SEATTLE WA 98117
SUZANNE-ELLIOTT@MSN.COM
(206) 623-0291

Counsel for the Petitioners

QUESTION PRESENTED

Whether 18 U.S.C. § 924(c)(1)(B)(i) requires the government to prove that a defendant knew of the length of the firearm carried during the commission of a qualifying crime was less than 16 inches when the firearm's length triggers a mandatory 10-year sentence consecutive to all other sentencing provisions.

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Petitioners, Eric Henry Woodberry and Bradford Marselas Johnson,

respectfully asks that a writ of certiorari issue to review the judgment and opinion

of the Ninth Circuit published opinion, petition for rehearing denied April 20, 2021.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals, issued on February 11, 2021, is published at *United States v. Woodberry and Johnson*, 987 F.3rd 1231(2021) and is attached as Appendix A. The petition for rehearing en banc was denied April 20, 2021. That order is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

18 U.S.C. §924(c)(1)(B)(i) provides:

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device)

for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime be sentenced to a term of imprisonment of not less than 5 years;…

(B) If the firearm possessed by a person convicted of a violation of this subsection (i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years;

STATEMENT OF CASE

This Court has long held that criminal statutes must be interpreted against the background common law commitment to mens rea as the touchstone of criminally blameworthy conduct. Courts presume Congress intends to require a culpable mental state where a statute is silent regarding the required mens rea. The decision below, relying primarily on *Dean v. United States*, 556 U.S. 568 (2009), holds that Government need not prove that Mr. Woodberry and Mr. Johnson *knowingly* possessed a gun with a barrel less than 16 inches in length, as opposed to some other type of gun, because possessing any sort of gun in the commission of the underlying offense was itself illegal.

Eric Woodberry and Bradford Johnson were convicted of possessing a Marck-15 firearm with a barrel that was less than 16 inches long during a Hobbs Act robbery. Before trial, ATF Agent David Cline, measured the barrel of the rifle and determined it was less than sixteen (16) inches in length. 3RP 101-102. Agent Cline was unfamiliar with any particular government regulation specifying how to properly measure a rifle's barrel length. 3RP 104. He testified the "best method" to measure was with a dowel rod with the bolt closed and an appropriate measuring tape. One could "also measure just by knowing. You can see the end of the barrel

— by looking into the breach here, you can see the chamber, and you can measure the outside of the firearm as well . . ." 3RP 103.

Cline acknowledged that the barrel length was not apparent from the exterior of the weapon. 3RP 105-106. And the flash suppressor affixed to the end of the barrel on this rifle was not included in the measurement because it was not permanently attached. 3RP 106. The Marck-15 firearm was of a type that could be purchased on the legitimate market by a citizen. 3RP 108.

The District Court instructed the jury it could find Mr. Woodberry and Mr. Johnson guilty if the Government proved that the barrel of the was less than sixteen inches long. However, the district court omitted, over defense objection, any requirement that the jury find that Woodberry and Johnson knew that the barrel length was less than sixteen inches.

On appeal, as it had done throughout the proceedings, the Government argued that the provisions of 18 U.S.C. §924(c)(1)(B)(i) were not "elements" of a crime. In the Government's view, the statute was a "sentencing enhancement" and, thus, no mens rea was required. The Circuit Court correctly rejected this argument and held the short-barrel provision is an essential element that must be proven beyond a reasonable doubt. *United States v. Woodberry*, at 1236–37.

After concluding that the length of the barrel was an element of the crime, the Circuit panel considered whether the Government had to prove that Johnson knew the rifle was a short-barreled rifle. The Court held that it did not, because § 924(c)(1)(B)(i) "contains no mens rea requirement." *Id*. at 1237. Relying on *Dean v. United States*, 556 US. 568, 575 (2009), the Court held that the mens rea presumption does not apply to elements that do not separate innocent from wrongful conduct. In short, the Circuit Court held that 18 U.S.C. §924(c)(1)(B)(i) is a strict liability offense and Mr. Woodberry and Mr. Johnson could be sentenced to a minimum mandatory term of ten years even if they did not know the rifle barrel was less than 16 inches long.

REASONS FOR GRANTING THE PETITION

Criminal liability traditionally requires both a guilty act and a guilty mind. *United States v. Burwell*, 690 F.3rd 500, 530 (2012)(Kavanaugh, J. dissenting). Criminal offenses that dispense with a mens rea requirement are "disfavored." *Staples v. United States*, 511 U.S. 600, 606, 114 S.Ct. 1793 (1994); see also *United States v. United States Gypsum Co*., 428 U.S. 422, 438 (1978). This is because the "background assumption of our criminal law" is that a prohibited act, standing

alone, is insufficient to justify punishment, *Liparota v. United States*, 471 U.S. 419, 426 (1985); there must also be a "guilty mind." *Staples*, 511 U.S. at 607 n.3.

"The existence of a mens rea is the rule of, rather than the exception to, the Principles of Anglo-American jurisprudence." *United States Gypsum Co.*, 428 U.S. at 436 (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951); see also *United States v. X-Citement Video, Inc*., 513 U. S. 64, 70 (1994) (referencing the "background presumption of evil intent" applicable to criminal statutes); *Morissette v. United States*, 342 U.S. 246, 250-51 (1952) (principle "that an injury can amount to a crime only when inflicted by intention ... is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil"). The Circuit Court decision conflicts with this long line of precedent because it refused to apply the presumption of a mens rea to 18 U.S.C. §924(c)(1)(B)(i).

The Circuit decision dispensed with the presumption of a mens rea by relying on *Dean v. United States*, 556 U.S. 568 (2009). *Woodberry* at 1237. In *Dean*, the Court considered an adjoining provision in § 924, which increases the mandatory minimum sentence imposed for "crime of violence" offenses involving a "firearm [that] is discharged." 18 U.S.C. § 924(c)(1)(A)(iii). In *Dean*, the Court

that the "discharge" provision in § 924(c)(1)(A)(iii) required no separate proof of intent.

But *Dean* was decided before the Court's decision in *Alleyne v. United States*, 570 U.S. 99 (2013). The *Dean* Court considered the matter under the existing law that treated mandatory minimum sentencing provisions differently from offense elements for purposes of the presumption of mens rea. But in *Alleyne*, the Court held that "[a]ny fact that, by law, increase[s] the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt. *Alleyne* at 103.

The difference between a "sentencing factor" and an element is critical because the presumption of mens rea applies to every *element* of a crime. *Burwell* at 528, Kavanaugh, J, dissenting. Here the Circuit decision gave lip service to the fact that the lengthy of barrel is an element of the crime but rejected Johnson's argument. The fact that the short barrel provision constitutes an element of a separate crime rather than a sentencing factor is a critical factor in deciding whether a mens rea term attaches. The Circuit Court erred in failing to recognize this critical change in the law after *Dean*.

Further there is no support for the Circuit's conclusion that the presumption of a mens rea applies to some elements not others. See *Burwell* at 529, Kavanaugh, J, dissenting. In *Flores–Figueroa v. United States*, 556 U.S. 646 (2009), the statute applied to a person who—while committing a listed predicate crime—knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person. The Court decided that "knowingly" applied not just to the fact of the defendant's possession or use of the fake identification card but also to the identity on the card being "of another person." The Court applied the rule of statutory interpretation that an express mens rea as to one element of the offense applies to all of the elements. "The manner in which the courts ordinarily interpret criminal statutes is fully consistent with this ordinary English usage. That is to say courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Id*. at 652.

Thus, the Circuit Court's decision conflicts with *Flores–Figueroa.* The requirement of a mens rea as to other elements actually supports the conclusion that the mens rea applies to the length of the barrel. That is because the presumption as to each element is necessary to avoid criminalizing apparently

innocent conduct. A mens rea element is necessary to avoid convicting and sentencing Mr. Woodberry and Mr. Johnson for more serious criminal conduct when, had the jury been permitted to consider Agent Cline's testimony, it may well have concluded the evidence insufficient to find, beyond a reasonable doubt, that Petitioners knew the barrel was less than 16 inches. And, in that case, neither would be subject to the ten year minimum mandatory sentence.

Further, the Circuit's conclusion that 18 U.S.C. §924(c)(1)(B)(i) does not penalize otherwise innocent conduct directly conflicts with *Staples*. *Staples* considered the statute criminalizing possession of unregistered firearms, including machineguns, with punishment of up to ten years' imprisonment. 511 U.S. at 602–03. Although the statute contained no explicit mens rea to "travel" through the subsection, the Court rejected the Government's argument that the provision was a public welfare offense, noting the "long tradition of widespread lawful gun ownership by private individuals in this country."

> Of course, we might surely classify certain categories of guns—no doubt including the machineguns, sawed-off shotguns, and artillery pieces that Congress has subjected to regulation—as items the ownership of which would have the same quasi-suspect character we [have previously attributed to public welfare offenses.] But precisely because guns falling outside those categories traditionally have been widely accepted as lawful possessions, their destructive potential[ ] ... cannot be

> said to put gun owners sufficiently on notice of the likelihood of regulation....

511 U.S. at 611–12. In Agent Cline's testimony, this firearm was not illegal per se and could have been legally possessed by a citizen who complied with the registration statute.

Following *Staples* the Ninth Circuit, and six others, directly addressed the mens rea requirement for a registration violation and required the Government to prove that the defendant knew of the particular characteristics that subjected his short barreled rifle to registration. *United States v. Gergen*, 172 F.3d 719, 723 (9th Cir. 1999); see also *United States v. Reyna*, 130 F.3d 104 (5th Cir. 1997)(applying *Staples* to sawed-off shotguns); *United States v. Owens*, 103 F.3d 953, 956 (11th Cir.1997) (requiring mens rea for the characteristics of a rifle with a barrel less than 16 inches long); *United States v. Edwards*, 90 F.3d 199 (7th Cir.1996); *United States v. Mains*, 33 F.3d 1222 (10th Cir.1994); *United States v. Starkes*, 32 F.3d 100 (4th Cir.1994); *United States v. Dewalt*, 92 F.3d 1209, 1212 (D.C.Cir.1996)(the mens rea requirement was conceded by the government).

Thus, the Circuit's conclusion conflicts with *Staples* and its own decision in *Gergen*. Because possession of firearms, including many rifles, is protected by the Second Amendment and is, in the main, a lawful activity, statutes not just

penalizing possession of them but imposing particularly harsh penalties, can penalize "entirely innocent" conduct. There is no principled way to distinguish *Staples* to require proof of knowledge that a rifle's barrel is less than 16 inches for a mere possession offense but find that such knowledge is not required under 18 U.S.C. §924(c) where a matter of missing inch or two of length on the rifle's barrel would result in a consecutive ten-year sentence.

CONCLUSION

Petitioner requests this Court grant the petition for certiorari.

Dated: August 23, 2021

Respectfully submitted,

/s/*Suzanne Lee Elliott*

Suzanne Lee Elliott
Attorney at Law
Suite 339, 2400 N.W. 80th St.
Seattle, WA 98117
Suzanne@suzanneelliottlaw.com